

PHILIP A. HARRIS, )  
 )  
 Plaintiff, ) Case No. C09-385-JLR-BAT  
 )  
 v. ) **REPORT AND**  
 ) **RECOMMENDATION**  
 )  
 MICHAEL J. ASTRUE, Commissioner of )  
 Social Security, )  
 )  
 Defendant. )  
 )

Plaintiff Philip A. Harris seeks judicial review of the denial of his application for disability insurance benefits and supplemental security income after a hearing before an administrative law judge (“ALJ”). Plaintiff argues that the ALJ erred in (1) evaluating his medically determinable severe impairments, (2) evaluating the medical opinions, (3) failing to comply with the Appeals Council’s remand order, and (4) determining plaintiff’s residual functional capacity. For the reasons set forth below, the Court recommends that the Commissioner’s decision be **REVERSED** and **REMANDED** for further proceedings.

Plaintiff, who is currently 49 years old, has a high school education. Tr. 101, 114. He has past work experience as a dry cleaner and cook, and was last employed as an automotive oil

1 changer in 1997. Tr. 109. Dkt. 15 at 2.

2 On August 19, 2003, plaintiff applied for disability insurance benefits and supplemental  
3 security income benefits alleging disability as of May 1, 2003. Tr. 97-100. His application was  
4 denied initially and on reconsideration. Tr. 82. The ALJ held a hearing on March 22, 2006. The  
5 ALJ's decision of September 7, 2006 found plaintiff not disabled. Tr. 33. On July 24, 2008, the  
6 Appeals Council vacated the ALJ's decision and ordered a remand. Tr. 28-32. In its remand  
7 order the Appeals Council directed the ALJ to evaluate the effects of a possible substance abuse  
8 disorder ("DAA"), consider the opinions of Dr. Anita Peterson, Ph.D. and Dr. Susan Hakeman,  
9 M.D., assess plaintiff's residual functional capacity with respect to past relevant work and  
10 evaluate new evidence. *Id.* at 19.

11 The ALJ held a second hearing on May 5, 2008 and issued a decision on July 24, 2008  
12 finding plaintiff not disabled. Tr. 25. On January 29, 2009, the Appeals Council denied review  
13 of that decision making it the Commissioner's final decision under 42 U.S.C. § 405(g). Tr. 9.  
14 Plaintiff now seeks judicial review of the ALJ's final decision.

## 15 **II. THE ALJ'S DECISION**

16 The ALJ applied the five-step sequential evaluation process for determining whether a  
17 claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920. At step one, the ALJ found plaintiff  
18 has not engaged in substantial gainful activity since May 1, 2003, the alleged onset date. Tr. 20.

19 At step two, the ALJ found plaintiff has the following severe impairments: anxiety  
20 disorder, personality disorder, and substance addiction disorder. Tr. 20.

21 At step three, the ALJ found plaintiff does not have an impairment or combination of  
22 impairments that meets or medically equals one of the listed impairments in 20 C.F.R. Part 404,  
23 Subpart P, Appendix 1. Tr. 21.

1 The ALJ next found plaintiff has the residual functional capacity

2 to perform the full range of physical work at all exertional levels, and to  
3 adequately perform the mental activities generally required by  
4 competitive, remunerative, unskilled work as follows: understand,  
5 remember and carry out simple activities (i.e. to maintain concentration,  
6 persistence, and pace) in an ordinary work setting on a regular and  
7 continuing basis (i.e. 8 hours a day, 5 days a week, or equivalent work  
8 schedule), within customary tolerance of employers' rules regarding sick  
9 leave and absence; and to make judgments commensurate with the  
10 functions of unskilled work, such as making simple, work-related  
11 decisions, responding appropriately to supervision, co-workers and work  
12 situations, and dealing with changes within a routine work setting. He  
13 should not deal with the general public as in cashiering or as a waiter.  
14 The incidental contact that may occur in a hotel/motel room cleaner job  
15 would not be precluded.

16 Tr. 22.

17 At step four, the ALJ found plaintiff is capable of performing his past relevant work as  
18 dry cleaner machine presser. Tr. 24.

19 At step five, the ALJ found plaintiff has not been under a disability, as defined in the  
20 Social Security Act, from May 1, 2003 through the date of the decision. Tr. 25.

### 21 **III. STANDARD OF REVIEW**

22 This Court may set aside the Commissioner's denial of disability benefits when the ALJ's  
23 findings are based on legal error or not supported by substantial evidence. 42 U.S.C. § 405(g);  
24 *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). "Substantial evidence" is more than a  
25 scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might  
26 accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 201 (1971);  
27 *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ determines credibility,  
28 resolves conflicts in medical testimony, and resolves any other ambiguities that might exist.  
29 *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine  
30 the record as a whole, it may neither reweigh the evidence nor substitute its judgment for that of

1 the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence  
2 is susceptible to more than one rational interpretation, it is the Commissioner’s conclusion that  
3 the Court must uphold. *Id.*

#### 4 **IV. DISCUSSION**

##### 5 **A. Plaintiff’s medically determinable severe impairments**

6 Plaintiff argues at step-two the ALJ erred by failing to find “organic mental disorder” to  
7 be a severe impairment. Dkt. 19 at 6. At step two, plaintiff must show (1) he has a medically  
8 determinable impairment or combination of impairments and (2) the impairment or combination  
9 of impairments is severe. *See Bowen v. Yuckert*, 482 U.S. 137, 146 (1987); 20 C.F.R.  
10 § 404.1520(c), 416.920(c). As plaintiff has not pointed to anything in the record showing he has  
11 been diagnosed with “organic mental disorder,” he has failed to meet his burden of showing that  
12 he has the medically determinable severe impairment of “organic mental disorder.” The ALJ’s  
13 step two analysis is supported by substantial evidence and should be affirmed.

##### 14 **B. Evaluation of medical opinions**

###### 15 **1. Dr. Susan Hakeman, M.D.**

16 Plaintiff argues the ALJ erroneously rejected Dr. Hakeman’s 2003 and 2008 opinions.  
17 Dkt 15 at 9-10; Dkt. 20 at 5-8. In July 2003, Dr. Hakeman prepared a report that plaintiff had  
18 depression, possible bipolar disorder, panic disorder and polysubstance abuse in remission. Tr.  
19 23. The ALJ found Dr. Hakeman’s report not supported by clinical findings. *Id.* This finding is  
20 contrary to the record. Dr. Hakeman noted under the clinical findings section of her report, that  
21 plaintiff had depressed mood, made verbal expressions of anxiety or fear, had social withdrawal,  
22 motor agitation, paranoid behavior, hyperactivity, physical complaints and marked global illness.  
23 Tr. 424. As part of her clinical findings, Dr. Hakeman also added personal observations. To

1 “Verbal expression of anxiety or fear,” she added “worry, panic.” To “paranoid behavior” she  
2 added “thinks others speak of him.” And to “Physical complaints” she added “Arm – surgery to  
3 remove wire, ↑ infection.” *Id.* The record clearly shows Dr. Hakeman made clinical findings in  
4 her report and that the ALJ erred in finding that her report was not supported by such findings.

5 The ALJ also stated that “earlier treatment records of another doctor showed plaintiff  
6 “had good mental status functioning (exhibit 13F:6).” Tr. 23. The Commissioner contends this  
7 is a specific and sufficient reason for the ALJ to reject Dr. Hakeman’s opinions. Dkt. 19 at 11.  
8 The contention is not supported by the record. Exhibit 13F:6 is a “progress record” of March 5,  
9 2003 from North Sound Family Medicine. Tr. 402 It notes plaintiff’s mental status as “Nl  
10 orientation to time, place and person. Recent and remote memory nl. Mood and affect. Nl.” *Id.*  
11 But consistent with Dr. Hakeman’s clinical findings, it also states that plaintiff was “[f]eeling  
12 depressed. [Had] lowered mood, interest in usual activities, energy level, concentration and  
13 appetite. Psychomotor agitation and retardation. Poor sleep. No suicide ideation. Anxious.” *Id.*

14 Moreover, plaintiff’s mental health problems are repeatedly noted in his North Sound  
15 Family Medicine records: “major depression” (Tr. 409); “anxiety/panic attack/adjustment  
16 disorder/anxious mood” (Tr. 408); “fatigue x7 days” (Tr. 404); “major depression” (Tr. 400); and  
17 “anxiety, depression” (Tr. 393). Accordingly, the findings in the earlier treatment records are not  
18 specific and sufficient reasons for the ALJ to reject Dr. Hakeman’s 2003 opinions.

19 The ALJ also found Dr. Hakeman’s 2008 “functional evaluation not sufficiently  
20 supported to be reliable.” Tr. 24. In that evaluation Dr. Hakeman found plaintiff’s “mood  
21 disorder NOS, bipolar v. unipolar, anxiety, and heroin dependence . . . caused moderate to  
22 marked cognitive and social limitations (exhibit 43F).” The ALJ noted Dr. Hakeman used a  
23 “check-box form” and that the “check-box form was not supported by a reference to clinical

1 findings.” Tr. 23. However, this is at odds with the ALJ’s statement that:

2 Dr. Hakeman provided a progress note that appears to be a mental status  
3 examination or observation (exhibit 43F:5). There, the claimant presented  
4 as very restless and with poor fund of knowledge. His mental status was  
5 otherwise intact but he seems to have some concentration and recall errors  
(exhibit 43:5), typical of limitation to simple tasks. Dr. Hakeman noted  
the claimant’s history of substance abuse, but was not informative in  
assessing its affect on the claimants functioning (exhibit 43F:2-3).

6 *Id.* In the progress note, Dr. Hakeman reported that plaintiff moved “constantly throughout the  
7 session. One of the top 2% of physical motion I have seen;” that plaintiff had an “angry” mood  
8 and “limited” affect range; that plaintiff had problems performing tests on recall, word  
9 sequencing, serial sequencing (counting by seven); and naming the states that bordered  
10 Washington. Tr. 722. Dr. Hakeman also made numerous notations about plaintiff’s social  
11 limitations outside of the check-box form. She noted plaintiff’s history of anxiety, that it was  
12 hard for him to be in public and that he leaves public settings. Tr. 718- 720.

13 The Commissioner also argues the ALJ properly rejected Dr. Hakeman’s opinions on the  
14 grounds the doctor did not adequately assess the effect of substance abuse on plaintiff’s  
15 functioning, and the opinions were thus “not informative.” Dkt. 19 at 11. The problem with this  
16 argument is in social security cases, “the ALJ has a special duty to fully and fairly develop the  
17 record and assure that the claimant’s interests are considered.” *Brown v. Heckler*, 713 F.2d 441,  
18 443 (9th Cir. 1983). If the ALJ thought he needed to know more about the basis of Dr.  
19 Hakeman’s opinions in order to evaluate them, he had a duty to conduct an appropriate inquiry  
20 by calling the doctor to testify or by submitting questions. *See Smolen v. Chater*, 80 F.3d 1273,  
21 1288 (9th Cir. 1996). Accordingly, the Court finds the ALJ rejected Dr. Hakeman’s opinions  
22 without giving specific and legitimate reasons.  
23

1           **2.       Dr. Ellen Lind, Ph.D.**

2           Plaintiff argues the ALJ erred by incorrectly evaluating Dr. Lind’s findings about his  
3 social and cognitive limitations, and by failing “to mention or give any reason to reject the  
4 doctor’s opinion that plaintiff’s anxiety-related disorder met or equals severity listing 12.06.”  
5 Dkt. 15 at 11-12; Dkt. 20 at 5-8. The Commissioner contends the ALJ did give proper reasons  
6 for rejecting Dr. Lind’s opinions by incorporating his 2006 evaluation of Dr. Lind into the  
7 decision presently before the court. In the 2006 decision the ALJ stated Dr. Lind’s opinion was  
8 “not well supported.” Tr. 39.

9           In the 2006 decision, the ALJ considered several reports from Dr. Lind. Dr. Lind opined  
10 that plaintiff was disabled and unable to work. Tr. 657. She also prepared Department of Social  
11 Health and Services assessments in 2004 and 2006. Tr. 643-650. In the 2004 assessment, she  
12 made the following clinical findings: that plaintiff had depressed mood, lacks energy and  
13 motivation, was socially isolated and had feelings of hopelessness; and that he had anxiety, panic  
14 attacks and PTSD. Tr. 644. Dr. Lind reported plaintiff had “problems w/reading concentration.  
15 Unable to read due to short-term memory focusing issues.” Tr. 645. In the 2006 assessment, Dr.  
16 Lind made similar clinical findings noting that plaintiff was “sad all the time, low energy,  
17 hopelessness, unable to focus, suicidal feelings but no attempts” Tr. 648. She noted plaintiff  
18 was socially withdrawn, “stays at home most of the time, has few friends” and “fears when  
19 riding the bus.” Tr. 649-50.

20           In the 2006 decision, the ALJ found that the “symptoms of [plaintiff’s] anxiety disorder  
21 include motor tension, apprehensive expectation, and vigilance and scanning. He has recurrent  
22 and intrusive recollections of a traumatic experience, which is a source of marked distress  
23 (Exhibit 38F). He experiences high levels of anxiety and panic attacks when situational stress

1 arises. He lacks energy and motivation and has feelings of hopelessness (exhibit 36F).” Tr. 37.  
2 Despite making these findings, the ALJ found Dr. Lind’s opinions “not well supported.” Tr. 39.

3 The Commissioner defends the ALJ’s finding stating “the ALJ pointed out that Plaintiff  
4 could cook, handle money, take public transportation, read, and watch television six hours a  
5 day.” Dkt. 19 at 12. However, these activities are not incongruous with plaintiff’s alleged  
6 impairments. There is a considerable difference between a person’s ability to engage in some  
7 daily activities and being able to work full time five days a week. *See Vertigan v. Halter*, 260  
8 F.3d 1044, 1050 (9th Cir. 2001). Hence, the fact that plaintiff can watch T.V., make meals for  
9 himself, or take the bus does not show that he can work eight hours a day, five days a week  
10 doing past work as a clothing presser for a dry cleaner. Accordingly, the Court finds the ALJ  
11 rejected Dr. Lind’s opinions without giving specific and legitimate reasons.

### 12 **3. Dr. Anita Peterson, Ph.D.**

13 Dr. Anita Peterson, Ph.D., an examining psychologist, prepared disability and residual  
14 functional capacity assessments. Tr. 377- 94. The ALJ found Dr. Peterson’s assessments  
15 consistent with the evidence and gave them great weight. Tr. at 23. Plaintiff argues the ALJ  
16 erred in doing so because Dr. Peterson failed to consider plaintiff’s anxiety disorder. Dkt. 20 at  
17 2-5. Dr. Peterson did not consider anxiety disorder because she did not find plaintiff suffered  
18 from the disorder. Tr. 377. This is, or course, inconsistent with the ALJ’s own determination  
19 that plaintiff suffers from anxiety disorder. Tr. 20. As such, the great weight the ALJ gave to  
20 Dr. Peterson’s disability assessment is not supported by the substantial evidence.

21 Plaintiff also argues the ALJ erred by failing to incorporate into his RFC assessment, Dr.  
22 Peterson’s opinion that plaintiff has the RFC to “manage simple, repetitive tasks away from the  
23 public, **without close** supervision.” Tr. 394 (emphasis added). This argument will be addressed



1 in the residual functional capacity discussion below.

2 **4. Debby Jemeyson, BSW**

3 Plaintiff argues the ALJ failed to give legitimate reasons to disregard Ms. Jemeyson's  
4 opinions. The ALJ noted that Ms. Jemeyson, a counselor at plaintiff's methadone treating  
5 source, prepared a functional assessment in 2008 opining that plaintiff had PTSD with significant  
6 social limitations "consistent with listing-level conditions and disability (exhibit 48F)." Tr. 24.  
7 The ALJ stated Ms. Jemeyson is not an acceptable medical source but that her comments would  
8 be considered. *Id.* The ALJ discounted Ms. Jemeyson's opinions because they were based on  
9 "subjective statements" and because she referred to particular counseling dates and the notes  
10 from those sessions were not available for review. *Id.*

11 Although Ms. Jeymeson is not an acceptable medical source, her opinion nevertheless  
12 constituted competent evidence to show the severity of plaintiff's mental impairment; the ALJ  
13 was therefore required to consider her opinions under the Commissioner's regulations. *See* 20  
14 C.F.R. §§ 404.1513(d), 416.913(d); *see also* 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00C(1)(c).  
15 To discredit Ms. Jeymeson's opinion, the ALJ must provide "germane" reasons. *Dodrill v.*  
16 *Shalala*, 12 F.3d 915, 919 (9th Cir.1993).

17 Here, as the basis for her conclusion that plaintiff was disabled, Ms. Jeymeson wrote:

18 Mr. Harris met with this writer regularly from the time he entered  
19 treatment until he was discharge[d], 8/10/05-2/5/07. Throughout this  
20 period, Mr. Harris continually struggled with SXs of depression and  
21 anxiety which affected his daily living. Mr. Harris regularly cycled  
22 through periods of severe depression, sometimes every-other-week to  
23 every month, and was required to be engaged in regular mental health  
appointments as a condition [of] treatment at Island Crossing Counseling  
Services. However, he had difficulty accomplishing this and was  
frequently out of mental health medication as well as lacking therapeutic  
counseling. Mr. Harris was reclusive and guarded from most of society,  
with the exception of a view individuals he trusted. Additionally, he was  
known to isolate himself in his camper trailer especially during the

1 periods his mental health/depression deteriorated. I believe Mr. Harris  
2 was continually plagued with grief, primarily loss of family or  
3 relationships, like a wound he tried to forget hurt. Mr. Harris  
4 demonstrated that he lives in a constant state of paranoia, so much so it  
5 could be considered a personality trait. I cannot recall a time when Mr.  
6 Harris demonstrated that he felt safe; frequently, he articulated concern  
7 that someone, or some fate, was going [to] prevent his best interest. I can  
8 clearly recall a number of times he would say, "It's just my luck," or  
9 "Why are people out to get me?". Mr. Harris frequently demonstrated  
deficiencies in his ability to concentrate, AEB: failing to arrange or  
attend scheduled appointments, forgetting to pay rent, jumping from one  
topic to another in conversations, and regularly demonstrating anxiety by  
continual fidgeting or inability to sit still. There were a number of times I  
met with Mr. Harris and he reported not being able to sleep. The only  
times I recall when he didn't have insomnia was when he had Seroquel,  
but he believed it cause side effects. The following are some of the  
discussions and date that supports the above.

10 Tr. 48F:6. Ms. Jemeyson's opinion is based on regular meetings spanning a year and a half.  
11 Her opinions about plaintiff's mental health and functioning depression are, as she describes,  
12 based on her observations and actual events such as failing to appear for appointments. The  
13 reason the ALJ gave for rejecting her opinion – that it is based on “subjective statements” – is  
14 not supported by substantial evidence.

15 The conclusion that Ms. Jeymeson's opinion should be rejected because her notes are not  
16 available for review is also not a germane reason to reject the opinion. It is clear that Ms.  
17 Jeymeson had referred to treatment notes to prepare her explanation of why she believed plaintiff  
18 was disabled. She referred to them at the end of her opinion and then listed the dates of the notes  
19 upon which she relied in forming her opinion. Tr. 48F:6-7. As discussed previously, the ALJ  
20 has a special duty to fully and fairly develop the record and assure that the claimant's interests  
21 are considered.” *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983). There is no indication  
22 that the ALJ requested the notes or that they were refused. If the notes were crucial to the ALJ's  
23 evaluation of Ms. Jeymeson's opinion, he had a duty to conduct an appropriate inquiry such as

1 subpoenaing them. In sum, the Court finds the ALJ rejected Ms. Jeymeson's opinions without  
2 giving germane reasons.

3 **C. Failure to comply with Appeals Council's order**

4 Plaintiff contends the ALJ erred by failing, as directed by the Appeals Council, to: 1)  
5 obtain updated psychological or physical evaluations, and 2) compare plaintiff's residual  
6 functional capacity with the demands of his past work. Dkt. 15 at 13, 15-16. Whether an ALJ  
7 complies with an Appeals Council order of remand is an internal agency matter which arises  
8 prior to the issuance of the agency's final decision. By failing to remand the matter a second  
9 time, it appears that the Appeals Council considered the ALJ's decision to be in compliance with  
10 the Council's previous order of remand. Section 405(g) does not provide this court with  
11 authority to review intermediate agency decisions that occur during the administrative review  
12 process. *See* 42 U.S.C. § 405(g). *See also Dishman v. Astrue*, 2009 WL 2823653 at \*10 (E.D.  
13 Tennessee, Aug. 27, 2009).

14 **D. Plaintiff's residual functional capacity and the "without close supervision"  
15 limitation**

16 Plaintiff argues that the ALJ erred in assessing plaintiff's residual functional capacity  
17 because the ALJ failed to include the need for plaintiff to work without close supervision.

18 A claimant's residual functional capacity "is the individual's maximum remaining ability  
19 to do sustained work activities in an ordinary work setting on a regular and continuing basis."  
20 SSR 96-8p (emphasis omitted); *see also* 20 C.F.R. § 404.1545. The ALJ must assess a  
21 claimant's residual functional capacity based on all of the relevant evidence in the case record,  
22 including medical source statements. SSR 96-8p. An ALJ must evaluate the findings of a non-  
23 examining state agency medical consultant in the same manner as other opinion evidence, and

1 must explain the weight given to such opinions. 20 C.F.R. § 404.1527(f)(2).

2 Plaintiff first argues the ALJ erred by failing to incorporate Dr. Peterson’s opinion into  
3 his RFC assessment. The Court agrees. Dr. Peterson opined that plaintiff “is capable of SRT  
4 [simple repetitive tasks] away from public, without close supervision. He may not maintain  
5 regular attendance, but there is a volitional component to his behavior.” Tr. 394.

6 In evaluating plaintiff’s residual functional capacity, the ALJ stated that Dr. Peterson’s  
7 reports are consistent with the evidence and that her conclusions are “given great weight.” Tr.  
8 23. But the ALJ’s residual functional capacity finding did not include as a limitation  
9 employment without close supervision. Rather, it stated plaintiff could work 8 hours a day, five  
10 days a week and could “make judgments commensurate with the functions of unskilled work,  
11 such as . . . and responding appropriately to supervision, co-workers and work situations and  
12 dealing with work changes within a routine work setting.” Tr. 22. The ALJ’s residual functional  
13 capacity assessment thus conflicts with Dr. Peterson’s opinion, an opinion the ALJ gave great  
14 weight.

15 The Commissioner argues the ALJ “did not adopt Dr. Peterson’s limitation of working  
16 “without close supervision” but instead found plaintiff capable of responding appropriately to  
17 supervision, co-workers and work situations.” Dkt. 19 at 14. However, the ALJ did not state he  
18 was rejecting Dr. Peterson’s opinion that plaintiff needed to work without close supervision.  
19 Rather he stated:

20 Dr. Peterson concluded that the claimant could manage simple repetitive  
21 tasks away from the public, without close supervision (exhibit 11F).  
22 These reports are consistent with the evidence (Exhibit 11F:3). The  
23 conclusions of Dr. Peterson are given great weight.

Tr. 23. The Court finds nothing in the ALJ’s decision that supports the Commissioner’s

1 argument. Additionally, the Court cannot properly assume the ALJ rejected parts of Dr.  
2 Peterson's opinions because an ALJ may not reject portions of the opinion without explanation.  
3 See 20 C.F.R. § 404.1527(f)(2). Accordingly, the Court concludes the omission of plaintiff's  
4 need to work without close supervision from the RFC assessment was erroneous.

5 **E. Harm of failure to include the "without close supervision" limitation**

6 Plaintiff argues the ALJ's failure to include the "without close supervision" limitation  
7 was not harmless and resulted in the vocational expert giving an opinion based on an incomplete  
8 hypothetical. Dkt. 20 at 12. The Commissioner argues the ALJ's conclusion that plaintiff could  
9 perform his past work as a dry cleaner machine presser properly took into account all of the  
10 evidence in the record and was supported by the vocational expert's opinion. Dt. 19 at 18-20.

11 An ALJ posing a hypothetical question to a vocational expert "must set out all the  
12 limitations and restrictions of a particular claimant." *Magallanes v. Bowen*, 881 F.2d 747, 756  
13 (9th Cir. 1989). An ALJ "need not include all claimed impairments in his hypotheticals [but] he  
14 must make specific findings explaining his rationale for disbelieving any of the claimant's  
15 subjective complaints not included in his hypothetical." *Ilight v. Social Sec. Admin.*, 119 F.3d  
16 789, 793 (9th Cir. 1997). If the assumptions in the hypothetical are not supported by the record,  
17 or do not reflect all of the claimant's limitations, the opinion of the vocational expert that  
18 claimant has a residual functional capacity has no evidentiary value. *Gallant v. Heckler*, 753  
19 F.2d 1450, 1456 (9th Cir. 1984); *Matthews v. Shalala*, 10 F.3d 678, 681 (9th Cir. 1993).

20 Here, vocational expert Roni Beall testified at the hearing before the ALJ. Tr. 816. Ms.  
21 Beall testified that she understood plaintiff had worked as a dryclean/presser, DOT 362.382-014,  
22 under the supervision of his grandfather. Tr. 841-2. The ALJ asked Ms. Beall to identify jobs  
23 plaintiff could perform using a hypothetical question requiring her to assume plaintiff "can

1 respond appropriately to supervisors, coworkers, and usual work situations and deal with  
2 changes in a routine work setting not dealing with the general public.” Tr. 841-2. The expert  
3 identified security guard and production and packaging type jobs. Tr. 843.

4 Plaintiff’s counsel then asked Ms. Beall:

5 [w]ith regard to the same hypothetical asked by His Honor, if we  
6 consider certain social factors, and by that I mean that hypothetical  
7 person was markedly impaired in their ability to relate appropriately to  
8 coworkers and supervisors, what affect would that have?”

9 Tr. 846. Ms. Beall answered: “That would be very problematic. It would eliminate those jobs.”

10 *Id.* Ms. Beall also indicated that plaintiff’s anxiety, panic attacks, social isolation and jerky  
11 movements would be unacceptable to an employer if those behaviors were significant enough to  
12 distract other employees. Tr. 846-47.

13 The ALJ’s hypothetical failed to include limitations noted by Dr. Peterson’s functional  
14 assessment, an assessment that the ALJ gave great weight. In her assessment, Dr. Peterson noted  
15 plaintiff’s claim that he suffered from depression, anxiety, agoraphobia, paranoia, and  
16 hypervigilance. Tr 393. Although Dr. Peterson questioned plaintiff’s credibility, she stated “Dr.  
17 buys his story.” *Id.* Based on this, Dr. Peterson concluded plaintiff could work but “away from  
18 public, without close supervision.” Tr. 394. However, apart from the limit of “not dealing with  
19 the general public,” the ALJ included none of Dr. Peterson’s limitations. In fact, the  
20 hypothetical assumed an individual who could respond appropriately to supervisors, coworkers,  
21 and usual work situations and deal with changes in a routine work setting, an assumption that is  
22 not supported by Dr. Peterson’s assessment or the assessment of any other doctor. Accordingly,  
23 the Court concludes the ALJ’s determination that plaintiff has the residual functional capacity to  
perform his past work as a dry cleaner machine presser is not supported by substantial evidence.

1 The Court therefore recommends the case be remanded for further proceedings. On  
2 remand, the ALJ should include in his RFC assessment the limitations set forth by Dr. Peterson.  
3 The ALJ should obtain additional vocational testimony to determine whether there are dry  
4 cleaner machine presser jobs that plaintiff can perform in view of all of his limitation and if not  
5 whether there exists in significant numbers in the national economy a job that plaintiff can  
6 perform.

## 7 V. CONCLUSION

8 For the foregoing reasons, the Court recommends that this case be **REVERSED** and  
9 **REMANDED** for further proceedings consistent with this Report and Recommendation. A  
10 proposed order accompanies this Report and Recommendation.

11 DATED this 16<sup>th</sup> day of February, 2010.

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14 BRIAN A. TSUCHIDA  
15 United States Magistrate Judge  
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